

PUBLIC MEETING MINUTES

April 12, 2007
PUBLIC EMPLOYMENT RELATIONS BOARD
1031 18th Street
Sacramento, CA 95814

Chairman Duncan called the meeting to order at 10:05 a.m.

Members Present

John C. Duncan, Chairman
Lilian S. Shek, Member
Sally M. McKeag, Member
Karen L. Neuwald, Member

Staff Present

Tami Bogert, General Counsel
Bernard McMonigle, Chief Administrative Law Judge
Eileen Potter, Chief Administrative Officer
Les Chisholm, Division Chief, Office of the General Counsel

Call to Order

Chairman Duncan called the Board to order for a return to the open session of the February 8, 2007, Board meeting. He reported that the Board met in continuous closed session to deliberate on cases pending on the Board's docket.

Since that open session in February, the Board has issued PERB Decision Nos. 1777a, 1885, 1886-H, 1887, 1888, 1889-H, 1890-M, 1891-M, 1892-M, 1893, 1894-M, 1895, 1896-M, 1897, 1898-M, Administrative Appeal Decision Nos. Ad-359-S, Ad-360, and Request for Judicial Review Decision No. JR-24. The requests for injunctive relief in I.R. No. 514 (Brenda Weakley v. City of Fresno) and I.R. No. 516 (Alliance of Orange County Workers v. County of Orange) were denied by PERB. A document containing a listing of the aforementioned decisions was made available at today's meeting.

Motion: Motion by Member Neuwald and seconded by Member Shek to close the February 8, 2007, public meeting.

Ayes: Duncan, Shek, McKeag, and Neuwald.

Motion Carried.

Chairman Duncan opened the meeting of April 12, 2007 and Member McKeag led in the Pledge of Allegiance to the Flag.

Minutes

Motion: Motion by Member Neuwald and seconded by Member Shek that the Board adopt the minutes of the Public Meeting of PERB for February 8, 2007.

Ayes: Duncan, Shek, McKeag, and Neuwald.

Motion Carried.

Comments From Public Participants

None.

Staff Reports

a. Administrative Report

Chief Administrative Officer Eileen Potter reported on the status of PERB's fiscal year 2007-2008 budget. She stated that PERB's pre-hearing budget meeting is scheduled on Monday, April 16, 2007 and the budget hearing before the Senate Subcommittee 4 is scheduled for April 25, 2007. PERB's earliest possible budget hearing with the Assembly will be set for April 25 or some time in May, 2007. Ms. Potter reported that currently, no issues were raised by the Legislative Analyst and Senate Budget Consultant regarding PERB's budget.

b. Legal Report

General Counsel Tami Bogert reported that the case processing and litigation reports were distributed to the Board for their review. With regard to the General Counsel's caseload, Ms. Bogert reported during the months of February and March 2007, PERB received a total of 159 new unfair practice charges, and 120 charge investigations were completed by PERB staff. In the same two-month time frame, PERB staff held a total of 60 informal settlement conferences.

With regard to injunctive relief (I.R.) requests, Ms. Bogert reported that during the month of March, one I.R. request was received and denied by the Board. During the month of April, three I.R. requests were filed with PERB, one was denied and two remained pending in the General Counsel's Office.

With regard to litigation, Ms. Bogert reported that briefing is now underway or complete in most of the current active cases. She further reported that three of the four essential employee strike cases are pending at their various stages, in three different district courts of appeal. She went on to report that the City and County of San Francisco v. Operating Engineers Local 39 case addressed the issue of whether PERB had the exclusive initial jurisdiction over the MMBA. PERB filed an amicus brief in late February and learned from the First District Court of Appeal that oral argument will occur on May 17.

Chief Administrative Law Judge Bernard McMonigle reported that the administrative law judge (ALJ) report was distributed to the Board for their review. He stated that the ALJ's currently have 11 decisions to write and 70 cases are set for formal hearings. Hearings are now being scheduled for July and August, rather than the traditional goal of scheduling within 60 days. The average caseload currently per ALJ is 12 cases. He also reported that 5 new cases were assigned in March, 18 formal hearings were closed and 29 proposed decisions were issued. Forty-six percent of the caseload is currently in Los Angeles, 41 percent in Sacramento and 13 percent in Oakland. For the month of April, 16 informal hearings were scheduled in the Sacramento Region Office. There are currently 6 ALJ's in his division and he is hopeful that if the budget would allow for one more ALJ position, that may help their workload immensely.

c. Legislative Report

Division Chief, Office of the General Counsel, Les Chisholm distributed to the Board the weekly legislative update on the various bills that affect PERB's jurisdiction. He is closely monitoring Assembly Bill 1463 (Eng), a bill which would attempt to bring joint powers agencies under the EERA rather than the MMBA. Member Neuwald asked Mr. Chisholm whether joint powers covered more than just school districts. He responded that he would research that question in more detail and report back to the Board with an answer. He also reported that Assembly Bill 1164 (De Leon) was amended substantially to provide for child care provider representation provisions.

Motion: Motion by Member McKeag and seconded by Member Neuwald that the Administrative, Legal Reports (including General Counsel and Chief Administrative Law Judge) and Legislative Report be received.

Ayes: Duncan, Shek, McKeag and Neuwald.

Motion Carried.

Public Hearing on Proposed Rulemaking

Chairman Duncan opened the public hearing on proposed rulemaking to adopt, amend or repeal various sections of the Board's regulations concerning proof of support, revocation of proof of support, and other technical changes pursuant to Government Code section 11346.8. After reviewing all comments, objections and recommendations, the Board will consider the adoption, repeal and amendment of these regulations as described in the Notice of Proposed Rulemaking published in the February 16, 2007, California Regulatory Notice Register. According to the notice, written comments were to be submitted by 5:00 p.m., Friday, April 6, 2007 (11 written comments have been received and may be found on the PERB website).

Chairman Duncan requested that Mr. Chisholm from the General Counsel's Office give a presentation of the Board's proposed regulations.

Mr. Chisholm stated that PERB typically considers rulemaking for one or more of the following five reasons: 1) Newly-enacted legislation; 2) Changes in case law; 3) Experience with case processing that teaches that changes or improvements are needed in the regulations; 4) Suggestions made by interested employers, employee organizations and employees and 5) Identification of technical or grammatical errors, including mistakes in previous rulemaking. He stated that the proposed changes and additions that are the subject of today's public hearing, including those that have attracted the most attention in written comments, involved all five factors.

Mr. Chisholm stated, in all cases where the Board considers the adoption or amendment of regulations, the Administrative Procedures Act (APA) standards of authority, reference, consistency, clarity, non-duplication and necessity are applicable. Mr. Chisholm explained that the proposed rulemaking package was prepared as a result of the following issues:

- (1) The statutory changes that are referenced involve amendments to the MMBA (effective 2002) and EERA and HEERA (effective 2004) changing the provisions of the Act providing for mandatory card check recognition.
- (2) The change in case law in the Board decision, Antelope Valley Health Care District (2006) PERB Decision No. 1816-M (Antelope Valley).
- (3) The experience factor comes from issues that have arisen over the past year involving proof of support and revocations of proof of support that were submitted to agents of the Board in two cases in particular. One case involved a severance petition under the Dills Act, where a union argued PERB should accept and rely upon revocations of support, and the other case involved a request for recognition under HEERA. The union in that case argued PERB should not accept revocations but also stated that, if PERB is going to do so, PERB should adopt clear policies and guidelines, i.e., regulations.
- (4) The suggestions received from employees who were the subject of the HEERA request for recognition, who appeared before the Board on August 10, 2006. Concerns were expressed regarding their experiences and concerns about the proof of support, gathering of proof of support process and PERB's processes for reviewing proof of support.
- (5) There are changes in the package, including ones objected to, that were intended to be technical corrections, to conform certain regulations to other changes adopted in 2006.

Mr. Chisholm then summarized the following changes proposed for the Board's consideration:

1. EERA certification based on card check – new section 33485 and amendment to 33480. Adopted similar rule earlier for HEERA. Past experience has taught PERB that there is an expectation PERB will certify exclusive representative (as opposed to employer "granting" recognition) where card check recognition is mandated, just as PERB certifies election results. To date, no objections were received.

2. Various conforming changes or grammatical corrections are proposed to sections 32135, 32166, 32500, 32630, and no objections have been received.
3. Proposed changes to Unit modification regulations: Effective May 11, 2006, the Board adopted changes to its unit modification regulations that included specifying that majority proof of support is required where a petition would increase the established unit by 10 percent or more, and that at least 30 percent support would be required in all cases where the positions that are the subject of the unit modification petition are also addressed by a pending representation petition. A number of conforming changes are included in the current rulemaking package. Among those changes is a proposal to remove the hard and fast requirement that an employer provide a list of affected employees within 20 days of the filing of the petition, unless the Board directs otherwise. The rationale for this change is that neither the employer nor PERB, nor even the petitioner, may know within 20 days of the filing of the petition that proof of support will be required; thus no list would be produced. Thus, PERB staff felt it made more sense to remove the time-specific requirement applicable to all cases, and instead allow the Board to specify an appropriate time period in those cases where it matters (whether the time period be 10 days or 30 or more, or fewer).
4. “Plain English” revisions are proposed concerning section 32700(a). The idea of this proposal was to spell out in easy and understandable language what is required for various types of petitions, rather than making it necessary for a party or an employee to read multiple regulation sections to understand the requirements. To date, no objections to this aspect of the section have been received.
5. In section 32700(a)(1), a new language requirement – proposed with an intent to expedite rather than delay – would divide petitions into two types: those that must involve a secret ballot election in order to have a change in the status quo (e.g., decertification, severance under the Dills Act, fair share fee rescission), and those that can result in recognition of a petitioning organization without an election. Based on the experience with numerous cases since the statutory change involving card check recognition, the idea is to find a way to avoid or limit calls (whether by employers or employees or even potentially another employee organization) for PERB to investigate the question of whether employees understood that an election could not be required unless a second organization achieves at least 30 percent support. Thus, the proposed new language would require a petitioner to include language on authorization forms that explicitly acknowledges that an election may not be required. Some valid comments were received concerning the application to membership records or applications and PERB will need to take those concerns into consideration.
6. With regard to proof of support, PERB staff recommends deleting reference to, “other evidence as determined by the Board.” Mr. Chisholm stated the clarity standard of APA argues for deleting this language and to the best of the staff’s collective knowledge, this provision has never been utilized, thus raising the question of its necessity.
7. Section 32700(g) was added to the regulations several years ago based on experience where the “fraud and coercion” was raised frequently, and the appearance was that it was being used to delay proceedings. No standards existed in the regulations before that, not for when it could

be raised or what was required to raise it. PERB's experience, since the adoption of the current regulation, is that the issue is raised less frequently, and resolved more readily when raised. The suggested revision merely proposes eliminating some language that was arguably interpreted as meaning there were two levels of the PERB investigation. There is only one investigation. Either there is credible evidence requiring a hearing or there is not. Due process considerations would always apply in the course of such an investigation.

8. Proposed language regarding revocation: In Antelope Valley, the Board declared as a matter of policy that employees have a right to revoke an authorization for a union. Mr. Chisholm stated that PERB cannot administer that policy through underground regulations nor do they want to. The most efficient way to apply that policy is to have procedural rules for when and how an employee may exercise that right. As was discussed above, the staff recommendations divide petitions into two types: one type involves where no change in the status quo will occur unless there is a secret ballot election and the other type of case involves circumstances where there may not be an election. In those instances where there is not an election, PERB staff proposed that revocation be allowed.

Before making recommendations to the Board, PERB staff contacted a number of other state agencies and reviewed NLRB case law. In part, it was confirmed that there is little experience outside California with mandatory card check recognition, and thus the focus is on what would work well for employee organizations, employees and employers subject to the statutes PERB administers. There were numerous written comments received on this issue that have been distributed to the Board. The comments received were thoughtful and thought-provoking. PERB staff will request at the close of today's hearing an opportunity to further review, consider and evaluate all comments and prepare recommendations for the Board's consideration at a future public meeting.

Chairman Duncan opened the public hearing on proposed rulemaking to interested parties.

Assembly Member Loni Hancock, representing 14th Assembly District and Author of Assembly Bill 1230, expressed her disappointment at the possibility that PERB may adopt regulations that would weaken her bill. She clarified, for the record, that she never intended any such language which PERB is proposing to be placed in her bill nor was there any ambiguity in the bill about revocation. She also stated that the very language was rejected by the Legislature and believed that it was not authorized by the Legislation. Additionally, she spoke against another proposed regulation which would require the card to say if the document is signed, a union may be certified without an opportunity to vote. She encouraged PERB to refrain from doing anything that would radically change what was clearly the intention of the Legislature and of the Governor when the bill was signed. She strongly urged PERB not to adopt either one of those proposed regulations.

Member Shek asked Assembly Member Hancock, at the time the bill was signed, was revocation for the mandatory card check ever an issue? Assembly Member Hancock responded that there was no intention of revocation and that the bill was designed to bring the University of California closer to the same types of labor relations that most other employers and public agencies have with their unions.

Rebekah Evenson, with the firm of Altshuler Berzon, representing SEIU California State Council, echoed the statements made by Assembly Member Hancock, and that she too was in opposition to the proposed language on the proof of support cards. She stated that the Legislature's intent, when it established card check, was to make clear that recognition by card check is on equal ground with recognition by an election and is not a disfavored means of recognition. She saw it as a very democratic means and believed that the proposed regulations are inconsistent with the statute and the language the Legislature adopted, which allowed membership applications, due deduction forms, etc. to be used as proof of support. She also stated the proposed language is not consistent with other labor laws. Under the NLRA, an employer may recognize a union based on a showing of majority support.

In regard to the proposed regulation on revocation, Ms. Evenson emphasized the fact that if there were any revocation provision in the regulations, it should be extremely clear that there can be no employer involvement at all in the revocation process. She stated that the card check system was intended to eliminate employer coercion in the union recognition process and if any new revocation language is added, it should clearly incorporate that rule.

Henry M. Willis, representing International Union, UAW, expressed his opposition to the proposed regulation on the card check process. He stated that the changes that PERB is proposing are not only inappropriate but are counter to the intent of the Assembly Bill 1230. He addressed the language that the Legislature chose and why it ruled out revocation. He stated that all unions, with their years of experience, look at the proposed regulations and see the practical problems. He went on to state that when the Legislature enacted under HEERA, the card check provisions in Government Code section 3577, it specified how card check is to be conducted, and that the key point is that it is based on proof of support which did not allow for revocation. He further stated that proof of support can only be submitted by unions, not by employees. If the Legislature wanted to enact a card check procedure that allowed for revocation after the fact, it would have had to address that in precise terms. He stated that requirement cannot be found in the statute nor can the language be found out of the definition of proof of support. He further stated that PERB does not have the authority to revise the definition of proof of support or to revise the procedures by which a proof of support is to be measured. In regards to Antelope Valley, he stated that under MMBA, it seemed to point in a different direction and that it had its unique provisions about the role of local agencies. He indicated that PERB had to make an ad hoc decision, but that decision in no way correlates with the statutory decisions made by the Legislature. He felt that Antelope Valley did not give any guidance to this issue.

Mr. Willis suggested it would be prudent for the Board to simply leave the regulations as they stand because PERB does not have the authority to import a new procedure for revocation that is not in the statute nor authorized by the statute, and in fact contradictory to the statute. He also stated that the Legislature has created a procedure which is designed to resolve these issues in a transparent and expedited manner and revocation is throwing a monkey wrench into the works. It complicates what is to be a straightforward procedure. He felt that revocation is inappropriate based on experience, statutory and policy grounds. He stated if revocation was ever allowed, notice would have to be given to the labor organization.

Ira Eisenberg, representing himself as a state employee at the Employment Development Department in Oakland, CA and other SEIU Local 1000 members, suggested a language change to subsection (b) of PERB Regulation sections 32705, 61025, 81025 and 91025 (included in his written comments dated 4/12/07). He urged the Board not to permit the revocation of proof of support signatures in cases of rescission and decertification. He explained that these were the only tools that he could find that rank and file members may use to seek discipline of their representatives. Without these tools, they are powerless to influence exclusive representatives. He felt it was important that there be a provision in the PERB regulations which protected employee rights to petition for redress of grievances through rescission and decertification petitions and not allow unions to intimate members into recanting their signatures when they felt such petitions were likely to succeed. He also added with regard to recognition cards, there is an important point of informed consent that should be addressed. He stated, by not including a statement informing the person who signed these cards the act was tantamount to a secret ballot election, and would invite uninformed consent. People would sign the cards assuming that they are not casting a vote and that they would actually be getting a chance to cast a secret ballot.

Priscilla Winslow, representing California Teachers Association, strongly objected to what they perceived as PERB's attempt to undermine the card check amendments of EERA. She stated that employer tactics include filing frivolous petitions with the NLRB claiming that Charter Schools are not public schools, litigating those issues all the way up to the Board in Washington, D.C. when the case had clearly been determined by California courts and PERB. Charter schools attempted to hold their own private elections after the card check amendments were passed.

Ms. Winslow indicated that requiring a statement on an authorization card informing the employees that there may not be an election denigrates the legitimacy of card check. She further stated that it contradicted the legislative history and ran contrary to U.S. Supreme Court and NLRB precedent which suggested that the only basis for denying the face value of an authorization card was proof of coercion.

In regard to revocation, Ms. Winslow stated it should not be allowed at all, especially as it applied to EERA. She compared the process of card check to a mail ballot election in a political contest, where once a ballot is placed in the mailbox, the vote cannot be revoked. She stated that if PERB established such a rule, the revocation must be served on the union, not kept confidential and be valid only if they predate the request for recognition. Despite the doctrine of employer free speech, she felt that employers should be prohibited from soliciting revocations but instead revocations should be invalid if the employer solicited them.

Ms. Winslow went on to state that she saw a grave problem with the proposal of regulation 32700(g) and disagreed with Mr. Chisholm's statement that this section provides some type of due process. She stated that there is no requirement for service of the allegations or declarations that would support an allegation of fraud or coercion. She stated that there is no requirement of service, and therefore no opportunity for a union who is accused of procuring cards by fraud or coercion to answer or to rebut those charges. She also stated another problem with proposed section 32700(g) is that there is no standard for determining if the

showing of support is inadequate because of the misconduct. She was therefore opposed to the proposed regulation that removed the prima facie case requirement, and strongly objects to the entire paragraph in its entirety. As she stated in her written comments, the possibility of dealing with fraud and coercion allegations was better dealt with through the unfair practice procedure.

Mr. Chisholm responded that Ms. Winslow's comments would have been better expressed at the public hearing several years ago when the regulation was adopted. He also stated that deletion of subsection (g) of section 32700 was not before the Board today as it was not included in the rulemaking package before the Board. PERB staff is currently only suggesting deletion of certain language from 32700(g). To date, there has been no instance where a claim under 32700(g) has been filed and an evidentiary hearing was necessary.

Xochitl Lopez, International Representative with UAW, expressed her opposition to revocation of authorization cards in the card check system. She stated that the proposed regulation would create confusion and would make the process as contentious as a traditional organizing campaign leading up to an election would be. She further stated that it would allow employers, even those who profess to be neutral, to discourage employees from signing cards and creating the impression that signing a card is a risky act that they should reconsider. She also stated that the card check process is a straightforward system and does not enter into the election process. Ms. Lopez provided the Board with a copy of her testimony and copies of sample authorization cards used in the CSU and UC campaigns.

Christine Bleuler, representing California School Employees Association, expressed her agreement with all of the written comments on the proposed regulations as well as by the public participants at today's meeting. She stated that the Legislature has in fact provided that card check recognition is a quick and expeditious process and a legitimate way of obtaining recognition. She continued her statement with that premise and addressed the issues mainly under EERA, stating that the Legislature wanted to expedite the representation process, eliminate delays in obtaining representational rights, and avoid long drawn-out elections campaigns and employer interference. She stated that mandatory card check recognition is now in place and in their opinion, the proposed regulations are contravening EERA and they believe that PERB does not have the authority to alter the statute. She went on to state that the proposed regulations in 32700(a)(1) absolutely obstruct and present obstacles to representation which is not authorized by EERA and is also in agreement with the written and oral comments made today regarding revocation of authorization cards. She respectfully urged the Board not to adopt the proposed regulations as presented here today.

Chris Niehaus, representing California School Employees Association, indicated that he saw the card check process as a membership application and when an employee signed the card, they are making a commitment to the union. He went on to state that included on the card is all pertinent information from the employee and they are signing up to join the union and they are willing to pay dues. By signing the card they are saying that they want the union to represent them and that they are voting and making a clear choice when they sign the cards. He respectfully urged the Board to not change the card check rules.

Caitlin Vega, representing California Labor Federation, expressed her concerns regarding the issue of the proposed change to PERB regulations on the proof of support. She stated the unions had such an outcry and level of concern about PERB's proposed regulations that she felt that it was important to testify before the Board today. She first recited a letter signed by the Honorable Gilbert Cedillo, Senator, 22nd District, stating his opposition to the proposed regulations regarding the revocation process of the card check procedure. She submitted his letter for the record on his behalf. Her fundamental concern was that the proposed regulations would make card check impossible in the public sector if the regulations were to move forward. She felt that PERB exceeded its authority and has gone beyond what the Legislature has extended. She further stated that there is legislation in Congress to make card check the law of the land in the private sector as well.

Libby Sanchez, representing Teamsters, Machinists, Amalgamated Transit Union, SCOPE-LIUNA, stated that they were opposed to the proposed regulations regarding card check recognition and strongly urged the Board not to amend the regulations as they relate to authorization for revocation. Ms. Sanchez stated that they strongly believed that several provisions within the proposed regulations would not meet APA standards if the regulations were approved by the Board and submitted to the Office of Administrative Law. She believed that the proposed regulations were contradictory and undermined the intent behind the statute. As mentioned earlier by Assembly Member Hancock, the Legislature had before it a proposal regarding revocation and it was rejected. She stated in the event that some sort of revocation process is envisioned, that it very clearly be confined to the time period prior to majority proof of support and that revocation be served on the union as well. She strongly urged the Board to, at the very least, amend the regulations pursuant to all the comments that were made by the unions present at today's meeting.

Robert D. Purcell, Director of the Public Employee Department for the Labor's International Union of North America, supported all the comments made by Ms. Sanchez. He pointed out that there were three items in the proposed regulations that provided an institutional tool for the employer to make recognition a difficult process: 1) the timing of the revocation period, 2) the confidentiality of the card, and 3) the authority of the employer. He stated, it would encourage a two-phase campaign, e.g. the card gathering campaign and the revocation campaign. He viewed it as an obstacle to the whole card check recognition process. He strongly urged the Board not to promulgate the proposed regulations.

Laura Bartley, post doctoral scholar at UC Davis, representing UAW, stated that based on her experience working with the UAW staff, she supported the existing card signing process and viewed it as a very transparent and democratic process. It gave post doctoral employees an opportunity to make an informed decision of representation. She explained, just as when a person casts a vote in a ballot box, they cannot take it back and the same would apply to people who read and sign the union cards. The signing of the union card is a commitment and would allow people a free choice of representation.

Kate Hallward, representing PEU Local 1, IFPTE Local 21, AFSCME Local 3299, and UPTE with CWA emphasized that the intent behind the card check Legislation in California was to create an alternative process that was on a par with the election process and not one that was

secondary or inferior to it. She went on to state that the proposed language by PERB may in some way imply that it is somehow lesser than an election. She indicated the card check process is supposed to be a one-step process and have a moment in time in which a third party counts the cards and establishes majority support. By creating a series of ways in which the employer either directly or indirectly may delay the process and extend the period for revocations or make allegations of fraud or coercion of which the union is uninformed, would effectively create a two-step process. On behalf of the unions she represented, she strongly urged the Board not to adopt the proposals as written. Written comments were submitted detailing alternatives for the Board's consideration.

Lyle Hintz, a retired state employee, representing Information Technology Unit 22, expressed his concern regarding the proposed regulation on revocation. He supported the adoption of the new rules clarifying the use of the revocation cards and requested approving the use of this rule retroactively to simplify and help resolve an issue currently on appeal before the Board. In closing, he urged the Board to not allow revocation cards to be used when an election is mandated at the end of the process.

Chairman Duncan thanked the interested parties for their excellent and helpful testimony and proceeded to a discussion with the full Board. He asked Mr. Chisholm, setting aside the decision in Antelope Valley, what legal authority does PERB have to adopt regulations concerning card check revocation under EERA, HEERA, Trial Court, Court Reporter's Act? Mr. Chisholm responded, in part, and reserved the right to take a more complete and thorough review as part of a later recommendation to the Board. He stated that under each of the Acts, PERB has general rulemaking authority including with regard to such subjects as the processing of recognition petitions, representation petitions, representation petitions, decertification petitions, etc. The language vary but historically has been treated as a fairly broad right of rulemaking authority in that area. In addition, he stated some Acts are more specific than others. HEERA provides in section 3577(a)(2)(a) that the procedures for determining proof of support shall be defined by regulations of the Board. That language existed before the card check recognition amendments, and still exists. He believed that provision gives PERB on-going authority to consider, adopt and revise regulations relating to the procedures for determining proof of support. He is unaware of any authority for the proposition that legislative amendments to a statute operate to "freeze in place" existing regulations of an agency such as PERB, unless expressly stated in the statute. Nevertheless, he stated staff would need to review very closely the Legislative intent question that was raised at today's meeting as well as whether the authority varied from Act to Act. Assuming the Board would want to adopt any regulations with regard to revocation, first comes the policy question of whether there will be revocation, and secondly whether PERB must distinguish from statute to statute how that would work.

Chairman Duncan stated that there were various comments made to proposed section 32700, et al. which would require that the employee organization clearly demonstrate that the employee understands that an election may not be conducted. He asked Mr. Chisholm, was the proof of support referred to in the latter part of (a)(1) intended to apply to card check process or more broadly? Mr. Chisholm replied the intent of the language, as presented, was that it would be applicable only in those cases where an election might not be required, for example a request

for recognition under the HEERA. It would not be relevant or applicable to a decertification petition filed under HEERA or a decertification petition filed under another statute. With a decertification petition, no matter what level of support the petitioner has, there is no change in the status quo unless there is an election that results in a change in the status quo.

Member McKeag stated that she did have some concerns in light of the comments received today and would reserve any questions on the proposed regulations until the next meeting where the package will be discussed again. She requested that staff do further analysis in light of the comments received today.

Member Shek stated that after listening to all the testimony received at today's meeting and reading the written comments submitted, she felt that one of the Board's fundamental issue was to address the statutory authority of the PERB to adopt such regulations. She reviewed Section 3577(a)(2)(a) which stated, in part, ...the procedures for determining proof of support shall be defined by regulations of the board. She did not disagree with the statement, however, she stated that it does not address the fundamental statutory authority of the Board and she would like some guidance and perspective from the staff, in particular, to refer to the comments and concerns raised during the public hearing today.

Chairman Duncan asked Mr. Chisholm if the proposed regulations regarding proof of support intended to be retroactive? Mr. Chisholm responded by saying that the proposed language did not address that issue specifically and defining "retroactive application" is an area that needs further analysis. If the proposed regulations are adopted, this issue will certainly be recognized as an area requiring thorough analysis in terms of how and when the new regulation will take effect.

Member Neuwald thanked staff for putting together the comprehensive rulemaking package and also thanked the interested parties for their comments. She stated that the Board approached this issue after the issuance of the Antelope Valley decision in the context of getting into a body of case law and assess whether PERB needed new regulations.

Motion: Motion by Member Neuwald and seconded by Member McKeag to close the public hearing on proposed rulemaking concerning proof of support, revocation of proof of support and other technical changes.

Ayes: Duncan, Shek, McKeag, and Neuwald.

Motion Carried.

Motion: Motion by Member Neuwald and seconded by Member McKeag to take up action at the next meeting in order to consider modification of the new regulations as a result of public comment.

Ayes: Duncan, Shek, McKeag, and Neuwald.

Motion Carried.

Old Business

Chairman Duncan stated that the Board will further consider the proposed amendments to PERB's agency fee regulations at this time. He clarified that the public hearing on the proposed rulemaking on this particular subject is already formally closed so no further public testimony will be taken at today's meeting. Pursuant to the December 1, 2006, Notice of Proposed Rulemaking, that was the subject of PERB's public hearing on February 8 of this year, modifications were made to the agency fee regulations in response to public comments received. A Notice of Proposed Modifications was made available on February 26, 2007, and written comments were to be received by 5:00 p.m. on Friday, April 6, 2007 (there were no written comments received).

Also, Chairman Duncan indicated at the February 8, 2007 public meeting, the Board requested that the General Counsel staff assess whether it would be appropriate to include additional regulatory language citing the court decision Cummings v. Connell (9th Cir. 2003) 316 F.3d 886 (Cummings) and report back to them with their recommendation at today's meeting. Chairman Duncan requested Mr. Chisholm from the General Counsel's Office give an update to the Board on the proposed modifications to the agency fee regulations and give any additional staff recommendations.

Mr. Chisholm stated, in regards to Cummings, PERB staff concluded that Mr. Milton L. Chappell, attorney, representing National Right to Work Legal Defense Foundation, Inc. was correct in stating an objection to the proposed change to PERB Regulation 32992 that would delete existing language requiring that an exclusive representative's audit report be made available to the nonmember subject to an agency fee requirement. However, the suggested language proposed by Mr. Chappell is not recommended and PERB staff has prepared alternative language which was provided to the Board for review. PERB staff recommended that the Board authorize staff to issue a second notice of proposed modification, allow written comment and then take action at a subsequent Board meeting on the entire agency fee package, as amended.

Motion: Motion by Member Neuwald and seconded by Member McKeag to adopt staff's proposed language regarding Cummings and have the General Counsel's Office issue a further 15-day notice to provide opportunity for written public comment.

Ayes: Duncan, Shek, McKeag, and Neuwald.

Motion Carried.

Chairman Duncan took an assessment from the Board as to their availability to meet some time in May 2007, after the 15-day notice period, to move the agency fee regulatory package forward. The full Board agreed.

New Business

None.

General Discussion

There being no further business, the meeting is recessed to continuous closed session.

The Board will meet in continuous closed session each business day beginning immediately upon the recess of the open portion of this meeting through June 7, 2007 when the Board will reconvene in Room 103, Headquarters Office of the Public Employment Relations Board. The purpose of these closed sessions will be to deliberate on cases listed on the Board's Docket (Gov. code sec. 11126(c)(3)), personnel (Gov. Code sec. 11126(a)), pending litigation (Gov. Code sec. 11126(e)(1)), and any pending requests for injunctive relief (Gov. Code sec. 11126(e)(2)(c)).

Motion: Motion by Member McKeag and seconded by Member Shek that there being no further business, the meeting be recessed to continuous closed session.

Ayes: Duncan, Shek, McKeag and Neuwald.

Motion Carried.

Respectfully submitted,

Chris Wong, Administrative Assistant

APPROVED AT THE PUBLIC MEETING OF:

John C. Duncan, Chairman